IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.226 OF 2007

IN

LETTERS PATENT APPEAL NO.125 OF 2003

...

Dillam P.Shah(deceased)

1A.Shivangi D.Shah & anr. ...Applicants

v/s.

The Greater Bombay Co.operative

Bank Ltd. & ors. ...Respondents

...

Mr.A.Y.Sakhare i/b Ms.S.S.Kadam for the Applicants.

Mr.Rajiv Kumar i/b S.R.Bhalekar for Respondent No.1.

Mr.Girish Rao i/b Lex Consultants for Respondent No.5.

Mr.J.Reis i/b Sean Wassodew for Respondent No.4.

Mr.A.H.Palekar, AGP for State/Respondent No.3.

...

CORAM: D.K.DESHMUKH &

V.M.KANADE, JJ.

DATED: 6TH DECEMBER, 2007

P.C.:

1. This Civil Application is taken out by the original Appellants in Letters Patent Appeal. In that Letters Patent Appeal following order was made on 14-3-2006:-

> On oral motion made by the learned Advocate for appellant/ applicant the appeal and the applications are allowed to be withdrawn and stands disposed of as withdrawn.
>
> Interim order, of any, stands vacated. There will be no order as to costs.

2. By this application, the Applicants want that we should recall this order. The relevant facts are that the Applicant No.1(a) Smt.Shivanji D. Shah and her deceased husband were guarantors in relation to a loan taken by a company from the Respondent No.1-bank. Admittedly, there was a recovery certificate issued under Section 101 of Maharashtra Co.operative Societies Act, 1960 for recovery of that

loan against Applicant No.1(a) and her husband. In execution of that recovery certificate a bunglow which was owned by Applicant No.1(a) and her husband was sold by auction. The Respondent No.4-Mehta Trading Co. was the auction purchaser. A revision was filed challenging the sale of the bunglow under Section 154 of the Co.operative Societies Act, but the recovery certificate was not challenged. In that revision application, an interim order was made. The Bank filed Writ Petition in this court challenging the interim order. That petition was decided by the learned single Judge of this court and the interim order passed by the revisional authority was set aside. Letters Patent Appeal No.125 of 2003 was filed challenging the order of the learned single Judge. It appears that the Applicant No.1(a) and her husband entered into a deal with the Respondent No.5 in relation to that property and in that connection executed a power of attorney in favour of Respondent No.5. According to the Applicants, instructions for withdrawal of the Letters Patent Appeal were given by Respondent No.5 in exercise of his power under the power of attorney. According to the Applicants, the Respondent No.5 had no authority to give instructions to the lawyer appearing for the Applicants to

withdraw the Letters Patent Appeal. According to the Applicants, that Letters Patent Appeal was filed by the Applicants, vakalatnama was given by them and therefore, instructions for withdrawal of that Appeal could have been given only by the Applicants. It is also claimed that the withdrawal was not in the interest of the Applicants. The Appeal came to be withdrawn as a result of collusion between the Respondent No.4 and Respondent No.5.

3. There is a delay of 364 days in taking out this civil application. An explanation is sought to be given for that delay.

4. The learned Counsel appearing for the Respondent No.4 pointed out to us that in the letter dated 7-6-2006 the Applicant No.1(a) has herself stated that the bank along with its reply produced a copy of the order dated 14-3-2006 passed by the Division Bench of this Court, whereby the Letters Patent Appeal was withdrawn. The learned Counsel submits that thus the Applicant No.1(a) was aware of the order passed by the Court in the Letters Patent Appeal for withdrawal of the Appeal on 7-6-2006, whereas the present Application has been filed on

28-6-2007. He submitted that, thus, there is no proper explanation for the delay.

5. When this was pointed out, the learned Counsel for the Applicants relied on paragraph 2 of the affidavit of the Applicant No.1(a) dated 8th August, 2007.

6. Now, first taking up the question of delay, it is clear from the letter of the Applicant No.1(a) that she was aware of the order passed in the Letters Patent Appeal on 7-6-2006. On this being pointed out, the only explanation that is given is to be found in paragraph (2) of the affidavit dated 8th August, 2007 of Applicant No.1(a). That paragraph reads as under:-

> 2. I say that when I came to know about withdrawal of the LPA by my Advocate, Mr.Sandeep S. Jinsiwale, I have written a letter to him on 7-6-2006 (Exhibit "C" to the Civil Application). I say that I tried to get in touch with Mr.Bharat Shetty after 7-6-2006, but he was either travelling or was abroad. Therefore, I could not get further

clarification from him. In the meantime I received reply from the Advocate. When I received the reply from the Advocate on record, I believed that since I have filed SLP in the Supreme Court challenging the order passed in C.A. No.241 of 2003 taken out in the L.P.A., it was not necessary to go deep into the matter and seek clarification from Mr.Bharat Shetty as to why he instructed for withdrawal of the LPA. It is only when my Advocate in the Supreme Court came to town and met me on 5-6-2007 I realised that unless the L.P.A. is restored my S.L.P. in the Supreme Court will not survive.

7. Perusal of the above explanation shows that according to Applicant No.1(a) after becoming aware of the withdrawal of the Letters Patent Appeal, she was chasing Mr.Bharat Shetty-Respondent No.5, but he was travelling abroad, and therefore, she could not get any clarification and it is only after her advocate on record in the matter in the Supreme Court informed her, that she filed the application.

8. The explanation cannot be accepted, because, it

is clear from the letter dated 7-6-2006 that the Bank had given a copy of the order passed by the court in Letters Patent Appeal, if she wanted to check the authenticity of that order she could have come to the court and checked the authenticity of the order. If according to her, Respondent No.5 had no authority to withdraw the Appeal, then it was not necessary to contact the Respondent No.5, she could have filed this application immediately in June, 2006 itself.

9. Thus, the explanation that is given for the delay, in our opinion, cannot be termed as a sufficient cause. Even considering the matter on merits, we find that by the power of attorney admittedly executed in favour of Respondent No.5, power was given to Respondent No.5 to withdraw the proceedings. It is clause 33 which is relevant. It reads as under:-

> 33. TO COMMENCE, prosecute, institute and defend, oppose, negotiate for settlement and settle and appear and represent is in respect of the said Scheduled property in all actions and legal proceedings and also to represent us in appeal and revision proceedings whether

> Civil, Original or appellate and in all applications or petitions in any Court of Law and also in proceedings before Municipal, Police, Revenue, Stamp, Public Works, Postal and/or Registration Authorities and also before all Magistrate, Judicial and Revenue Officers or other Officer or officers and to issue and accept service, writs, process or summons and to do all acts and things, as may be necessary to protect our interest and also if thought fit, to refer to arbitration, execute abandon and submit to judgment or decree or become non suited in any action or proceedings including to sign compromises deeds, or consent Terms etc. and without prejudice to the generality for the foregoing, to appear in all Courts, proceedings and attend all Courts, proceedings and attend all meetings before the officer or court or other Government or semi Government Authorities.

10. Perusal of the above clause shows that all powers were given to the Respondent No.5 in relation to proceedings in respect of the property. Only restriction is that those powers were to be exercised

by the Respondent No.5 to protect the interest of the Applicants. If according to the Applicants, the L.P.A. was withdrawn by the Respondent No.5 not to protect the interest of the Applicants, their remedy, in our opinion, would be to proceed against the Respondent No.5 to recover damages for abusing the authority given to him. No fault can be found with the conduct of the lawyer appearing for the Applicants in the Letters Patent Appeal withdrawing the appeal on instructions from the Respondent No.5, as alleged by the Applicants, because the power of attorney executed by the Applicants in favour of the Respondent No.5 clearly shows that the Applicants had given power to the Respondent No.5 also to withdraw the proceedings. The Letter Patent Appeal was in relation to the interim order passed in the revision where the validity of the auction sale of the Bunglow was challenged. The Applicants admittedly have entered into a deal in relation to the same bunglow. The Applicants, according to the power of attorney, had granted development rights of the said property to the Respondent No.5 and executed irrevocable power of attorney in his favour. Thus, it can not be said that the Respondent No.5 is a stranger and had no connection with the property which was the subject

matter of the appeal.

11. Civil Application is, therefore, disposed of.

(D.K.DESHMUKH, J.)

(V.M.KANADE, J.)